



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY

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April 3, 2006

Lisa D. Johnson, President  
Mirant Potomac River, LLC  
8711 Westphalia Road  
Upper Marlboro, MD 20774

**Re: Determination Upon Reconsideration of Claim of Confidentiality for Trona Injection Tests Report at the Potomac River Generating Station**

Dear Ms. Johnson:

This letter and accompanying enclosure sets forth the Department of Environmental Quality's (DEQ) determination upon reconsideration of Mirant Potomac River, LLC's (Mirant), claim of confidentiality with respect to the report entitled, "Trona Injection Tests, Mirant Potomac River Station, Unit 1, November 12 to December 23, 2005" (the Report).

### BACKGROUND

DEQ received the Report on January 17, 2006. The cover page of the Report was marked "Business Confidential" at the top center and "Mirant Business Confidential" in the lower left corner. Each subsequent page of the Report was marked "Mirant Business Confidential" in the lower left corner. Pursuant to 9 VAC 5-170-60 and DEQ's Confidential Information Guidance, on January 27, 2006, DEQ sent a letter to Mirant asking Mirant to explain in writing why the Report was entitled to confidentiality under the laws and regulations of the Commonwealth.

On February 16, 2006, DEQ received from an attorney on behalf of the City of Alexandria (the City) a request pursuant to the Virginia Freedom of Information Act (FOIA), Va. Code Ann. §§2.2-3700, et seq. The City's FOIA request asked for, among other things, "Reports and analysis of the testing of the use of Trona at the PRGS [Potomac River Generating Station] of (i) sodium sesquicarbonate ("Trona"), (ii) low-sulfur Columbian coal and (iii) combined trona injections and low-sulfur coal."

Ms. Lisa D. Johnson, President  
Mirant Potomac River, LLC  
April 3, 2006  
Page 2

On February 20, DEQ received a letter from you on behalf of Mirant responding to DEQ's January 27 letter, containing information and arguments in support of Mirant's claim of confidentiality for the Report. DEQ then began the process of evaluating Mirant's claim of confidentiality for the Report pursuant to the statutes, regulations, and policies discussed in the following section of this letter, and under the strict timing requirements of the Virginia FOIA.

On or about February 27, 2006, DEQ asked Mirant to provide DEQ with a copy of the Report that redacted only those specific portions of the Report that Mirant wished to claim as confidential. DEQ received a redacted copy of the Report from Mirant on the evening of March 1, 2006. DEQ concluded that the redacted portions of the Report were entitled to confidential treatment. On March 6, 2006, DEQ informed the City's attorney of this conclusion and provided the City with a copy of the redacted Report.

On March 10, 2006, DEQ received a letter from the City's attorney arguing generally that the redacted portions of the Report were not entitled to confidentiality as trade secrets and that the entire Report must be disclosed to the City under the FOIA. The City asked DEQ to reconsider its decision to keep the redacted portions of the Report confidential. Following an attempt by DEQ to arrange a compromise between Mirant and the City concerning the redacted portions of the Report, DEQ received a letter from Mirant's attorney on March 14, 2006, reasserting Mirant's claim to confidentiality to the redacted portions of the Report *in toto*. On March 15, 2006, DEQ received a letter from the City's attorney responding to the arguments made by Mirant's attorney the previous day. DEQ then commenced the process of reconsidering its decision to treat as confidential the redacted portions of the Report as requested by the City.

## **THE RECONSIDERATION PROCESS AND STATUTORY, REGULATORY, AND POLICY REQUIREMENTS**

The reconsideration was conducted under my oversight by a senior Air Compliance Manager and Air Permit Manager from separate regional offices, neither of whom had participated in the initial confidentiality decision. DEQ performed the reconsideration in accordance with the requirements of the Virginia FOIA, Va. Code Ann. §§2.2-3700, et seq., the Virginia statute pertaining to "Protection of trade secrets," Va. Code §10.1-1314.1, the Virginia air regulation pertaining to "Availability of information," 9 VAC 5-170-60, as well as DEQ's Agency Policy Statement No. 9-2005 relating to the Virginia Freedom of Information Act Compliance" and DEQ's Confidential Information Guidance.

The Virginia FOIA states in relevant part that "[e]xcept as otherwise specifically provided by law, all public records shall be open for inspection and copying by any citizens of the Commonwealth." Regarding the protection of trade secrets, §10.1-1314.1 of the Virginia Code states:

Any information, except emissions data, reported to or otherwise obtained by the Director, the Board, or the agents or employees of either which contains or might reveal a trade secret shall be confidential and shall be limited to those persons who need such information for purposes of enforcement of this chapter or the

federal Clean Air Act or regulations and orders of the Board. It shall be the duty of each owner to notify the Director or his representatives of the existence of trade secrets when he desires the protection provided herein.<sup>1</sup>

Regulation 9 VAC 5-170.60.A states, "Emission data in the possession of the board shall be available to the public without exception". Regulation 9 VAC 5-170-60.B continues:

Other records, reports, or information in the possession of the board shall be available to the public with the following exception. The board shall consider records, reports, or information confidential in accordance with §§10.1-1314 and 10.1-1314.1 of the Virginia Air Pollution Control Law upon a showing satisfactory to the board by an owner that records, reports, or information meet the criteria in subsection C of this section and the owner provides a certification to that effect signed by a responsible representative of the owner. . . .

Regulation 9 VAC 5-170-60.C goes on to set forth the categories of information one must provide in order to substantiate a claim for trade secrets protection:

In order to be exempt from disclosure to the public under subsection B of this section, the record, report or information must satisfy the following criteria:

1. Information for which the owner has been taking and will continue to take measures to protect confidentiality;
2. Information that has not been and is not presently reasonably obtainable without the owner's consent by private citizens or other firms through legitimate means other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding;
3. Information which is not publicly available from sources other than the owner; and
4. Information the disclosure of which would cause substantial harm to the owner.

See also DEQ "Agency Policy Statement No. 9-2005 relating to the Virginia Freedom of Information Act Compliance," pp. 9-10, and DEQ "Confidential Information Guidance." DEQ applied these statutes, regulations, and policies during its reconsideration of Mirant's claim of confidentiality.

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<sup>1</sup> A definition of the term "trade secret" is found in the Virginia Uniform Trade Secrets Act, Va. Code §59.1-336, which defines a "trade secret" as:

"[I]nformation, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

## DETERMINATION UPON RECONSIDERATION

The **YELLOW** highlighted portions of the enclosed copy of the unredacted Report indicate those portions of the Report that DEQ, upon reconsideration, has determined **are entitled to confidential status** under Virginia statutes and regulations and should remain redacted.

The **BLUE** highlighted portions of the Report indicate those portions of the Report that Mirant had redacted and claimed as confidential that DEQ, upon reconsideration, has determined **are not entitled to confidential status** under Virginia statutes and regulations and, therefore, **must be disclosed** to the City pursuant to the Virginia FOIA.

The **CLEAR** portions of the Report indicate those portions of the Report that Mirant did not redact and has not claimed as confidential.

The following is a brief page-by-page explanation of the reasoning behind why DEQ has determined upon reconsideration that certain previously redacted portions of the Report are not eligible for protection as confidential business information.

The Table of Contents on **page 2** does not contain confidential information. Appendix A contains the results of a particulate matter (PM) emissions test that have already been disclosed to the City. Moreover, the annual Relative Accuracy Test Audit (RATA) for the Potomac River plant's continuous emissions monitors (CEMs) for SO<sub>2</sub> at Appendix B does not contain confidential information and is publicly available.

The information that was unredacted on **page 5** is not confidential because it was merely: 1) descriptive of the *type* of information the Report contained without revealing the confidential substance or content of that information, or; 2) only described how the trona arrives at the plant and was transferred to the injection system without describing the injection system itself.

The information that was unredacted on **pages 6 and 7** is not confidential because it described a picture generally without revealing its confidential substance or content.

The information that was unredacted on **page 8** is not confidential because it: 1) had been previously disclosed by Mirant in a separate document entitled "Summary Report" of the full Trona Injection Tests Report or; 2) only described a figure generally without revealing its confidential substance or content.

The information that was unredacted on **page 9** is not confidential because it: 1) described basic SO<sub>2</sub> testing procedures that are publicly available; 2) made reference to the annual RATA (Appendix B); or 3) described a picture generally without revealing its confidential substance or content.

The information that was unredacted on **page 10** is not confidential because it was previously disclosed in the Summary Report or was merely generally descriptive of a table without revealing the table's confidential substance or content.

The information that was unredacted on **page 11** is not confidential because it related only to the type of coal combusted at the Potomac River plant during the stack testing, which is public information.

The information that was unredacted on **pages 12 and 13** is not confidential because it consisted of CEMs data, coal use data, basic SO<sub>2</sub> emission testing information, and emissions data, which is publicly available.

The information that was unredacted on **page 14** is not confidential because it was previously disclosed in the Summary Report or was generally descriptive of a table without revealing the table's confidential substance or content.

The information that was unredacted on **page 15** is not confidential because it consisted of basic emission data and testing information, or was disclosed elsewhere in the Report or Summary Report, which is publicly available.

The information that was unredacted on **page 16** is not confidential because it was previously disclosed in the Summary Report or referred generally to an unredacted chart on page 17.

The information that was unredacted on **page 18** is not confidential because it was either previously disclosed in the Summary Report, or consisted of opacity emissions data and general opacity testing information, which is publicly available.

The information that was unredacted on **page 19** is not confidential because it consisted of basic PM<sub>10</sub> emissions testing and protocol information, which is publicly available.

The information that was unredacted on **page 20** is not confidential because it described a chart generally without revealing its confidential substance or content.

Ms. Lisa D. Johnson, President  
Mirant Potomac River, LLC  
April 3, 2006  
Page 6

## CONCLUSION

DEQ will not provide the City with the portions of the Report that DEQ has determined upon reconsideration are not entitled confidentiality (i.e., the blue highlighted portions of the Report) for at least 48 business hours following your receipt of this letter. Please contact me if you have any questions.

Sincerely,



Richard F. Weeks  
Deputy Director

Enclosure

Cc: Paul Kiernan, Esq.  
Deborah Jennings, Esq.  
Constance Pierce, Esq.  
David Paylor w/o enclosure